JAMES H. LESAR
ATTORNEY AT LAW
1231 FOURTH STREET, S.W.
WASHINGTON, D.C. 20024

TELEPHONE (202) 646-0903

August 20, 1984

Dear

Enclosed is a hasty draft memorandum on H.R. 5164, a bill to exempt the CIA's operational files from the Freedom of Information Act. I am sending it to you because I have been informed you have an interest in this matter.

The House of Representatives is scheduled to vote on H.R. 5164 on September 10, 1984. The Senate has already passed its companion bill, the somewhat different Goldwater-Thurmond bill (S. 1324).

Because time is of the essence, any comments, criticisms or suggestions should be returned to me as soon as possible at the above address. I may also be reached by phone at the above number or at (703) 276-0404.

Sincerely yours,

James H. Lesar

FIRST DRAFT

MEMORANDUM REGARDING H.R. 5164

On September 10th, just one week after the House of Representatives reconvenes for a brief session before the election, it will vote on a bill, H.R. 5164, which awards the Central Intelligence Agency a broad exemption from the Freedom of Information Act. Because the bill neither limits how long the CIA may impose secrecy on its "operational" files nor guards against their destruction, scholars may never be allowed access to many of the most important materials documenting CIA activities. As a result, the public may be denied an opportunity--forever--to fully evaluate the CIA's conduct in some of the most abhorrent acts of our government that have ever come to light.

Just as ominously, H.R. 5164 may set a precedent which will allow still other agencies to obtain similar exemption from the Freedom of Information Act. If this bill passes, pressures for giving similar exemptions to other agencies, such as the Defense Intelligence Agency, will increase. Congress will soon be confronted with a parade of agencies seeking special exemption, and once it has obliged the CIA, the argument against extending the favor to other agencies becomes much weaker.

Despite the importance of the issues and the complexity of the bill's implications, H.R. 5164 has sped through Congress on greased skids. Only a few hours of hearings have been held, and these were largely dominated by representatives of the CIA and the American Civil Liberties Union, two traditional antagonists who

have collaborated in this legislation. Scant public attention has been given the bill, perhaps in part due to an assumption that the ACLU's position fully and adequately represents the interest of all segments of the public.

H.R. 5164, officially (and euphemistically) known as the "Central Intelligence Agency Information Act," is touted as a compromise bill: on the one hand, it is designed to relieve the CIA of the burden of searching for and reviewing certain "operational" records which are said nearly always to be exempt from disclosure under the current Freedom of Information Act; on the other hand, it is supposed to preserve the public's right to know about the activities of the Central Intelligence Agency and speed up the Agency's retrograde processing of information requests.

Scrutiny of the bill's provisions reveals, however, that it is the product not of compromise but of capitulation. The bill is heavily weighted in favor of secrecy--now and forevermore. The provisions which purport to safeguard a measure of public access to information are limited, weak, unclear, uncertain and unenforceable. To anyone familiar with the CIA's Freedom of Information Act track record and the timidity of federal judges confronted with the task of evaluating claims that disclosure will jeopardize national security, it is virtually certain that these provisions will ultimately prove to be meaningless.

H.R. 5164 is patterned after S. 1324, a bill introduced in the Senate by Senators Barry Goldwater and Strom Thurmond and passed by that body late last year. Although the two bills differ in some

particulars, both seek to exempt the CIA from its obligation under current law to search and review "operational files." As defined in the proposed legislation, "operational files" consist of certain broadly described files of the Directorate of Operations, the Directorate for Science and Technology, and the Office of Security.

The files of these three CIA components are critical to public evaluation of the CIA and its acitivities. Each of these components is known to have engaged in illegal, odious and highly controversial activities. The Directorate of Operations has engaged in foreign assassination plots and coups; through liaison with foreign security and intelligence services, it has spied on domestic political dissidents, burglarized their hotel rooms and homes, bugged their conversations. It also planted information in the U.S. media through foreign assets and subverted and used a wide variety of civic organizations.

The Directorate of Science and Technology (DST) tested mind-altering drugs on unwitting subjects. A U.S. Army Colonel, Robert Olson, plunged to his death from a hotel window after being subjected to such testing. DST also experimented in the effects of radiation, electric shock, psychological, sociological and harrassment techniques.

The Office of Security spied on numerous persons and infiltrated such organizations as the Washington Ethical Society, The Urban League, The Congress of Racial Equality and Women's Strike for Peace.

The potential scope of the exemption for "operational files" is extremely broad. For example, with respect to the Directorate of Operations, the CIA's department of "dirty tricks," the files which would be exempted are those which "document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services." Ralph W. McGehee, a former CIA official with personal knowledge of the CIA's operational files, told Congress that "some 80 to 90 percent" of Directorate of Operations files would fall into the liaison category.

The experience of author (Bitter Fruit) Stephen C. Schlesinger provides another indication of the importance to historical writing of the "operational files" which Congress is considering exempting. Seeking material on the CIA-backed coup in Guatemala in 1954, Schlesinger submitted a Freedom of Information Act request to the Agency. The CIA released 165 documents uncovered during two initial searches. After his attorney questioned the adequacy of the CIA's search, the Agency found an additional 180,000 pages in its operational file. Thirty years after the coup, the CIA still withholds them in toto. Under the proposed legislation, the CIA can continue to withhold them indefinitely without having its secrecy determinations subjected to any meaningful judicial review.

Section (c) of the House bill makes an attempt to limit the extraordinarily broad sweep of the exemption for "operational files."

Thus, section (c)(3) provides that exempted operational files shall continue to be subject to search and review for information concerning: "the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity."

At first blush, this may seem impressive. Under analysis, however, its allure quickly fades. The list of investigative bodies has obvious omissions. There is no mention of Presidential commissions, and as it pertains to Congress the list is restricted to "the intelligence committees of Congress" only. Thus, the assassination of President Kennedy, a subject of investigations by the Warren Commission, the Rockerfeller Commission and the House Select Committee on Assassinations, does not come within the purview of this exception. Nor would the investigation of the Patman Committee into the laundering of funds in the Watergate scandal be included. Moreover, the present list is almost entirely limited to investigative bodies that are either in-house organs of the CIA or, like the intelligence committees of Congress, have a history of being highly deferential to the Agency. The scope and depth of their investigations may be too narrow and too shallow to fully explore the public interest, leaving pertinent CIA records on the general or related subject(s) unaccessible under the provisions of this bill.

Or the investigations carried out by such bodies might even be cover-up or cover-your-ass type inquiries.

Moreover, the scope of this proviso is limited by several critical words and phrases whose effect is unclear. It excepts from the CIA's putative exemption "information concerning . . . the specific subject matter of an investigation by [the named investigative bodies] for any impropriety, or violation of law, Excutive order, or Presidential directive, in the conduct of an intelligence activity." One can easily envision endless haggling and stonewalling over what was the "specific subject matter" of each and every investigation.

The investigation must involve "an impropriety,"--whatever that means--"violation of law, Executive order, or Presidential directive in the conduct of "an intelligence activity." What is the meaning of "an intelligence activity?" Does it include the CIA's investigation of the assassination of President Kennedy? Was the disappearance of former CIA Agent John Paisley "an intelligence activity?" Yes, if you talk to his widow, who does not believe that the body fished out of Cheasapeake Bay six years ago was his. To the CIA, which contends that he committed suicide, no.

Aside from such intepretational problems, which abound in this bill, there is a major question as to whether H.R. 5164 permits the CIA to conceal controversial materials that are nonexempt by placing them in exempt operational files. With respect to the Senate bill, the answer is clearly "yes," since that measure con-

tains no provision for de novo review of the CIA's designation of "operational files." After testimony was taken on the Senate bill, the ACLU was reportedly "surprised" to learn that the CIA's legal experts were saying that it did not provide for de novo review, meaning, in layman's terms, that the courts would have to accept the CIA's designation of "operational files" as final rather than being required to reach an independent judgment on the basis of all the evidence placed in the court record.

As a result of the ACLU's education about the lack of de novo review in the Goldwater-Thurmond bill, as interpreted by the CIA, the ACLU took the position that it would not support the legislation absent a provision for de novo review. But the de novo review provision incorporated in H.R. 5164 at the ACLU's insistence is extremely weak and applies only in limited circumstances. For example, a requester may allege that the CIA has wrongly withheld requested records because they have been improperly placed in solely in exempted operational files. If he does this, he is required to support his allegation with "a sworn written submission, based on personal knowledge or otherwise admissible evidence." The class of requesters able to make such a statement on the basis of their own personal knowledge would appear to be limited to former CIA agents. De novo review of this issue under these terms is of no use.

Secondly, a requester may allege that the CIA has wrongly withheld the requested records "because of improper exemption of operational files." If this happens, all the CIA has to do to get

the case dismissed is file a sworn statement that the files "likely" to contain the requested records are currently serving as exempted operational files. The CIA's sworn statement does not have to be made on personal knowledge. All that is required is a CIA employee willing to swear that exempted operational files are likely to contain the requested records and are currently serving as exempted operational files. The CIA's sworn statement does not have to be made on personal knowledge. All that is required is a CIA employee willing to swear that exempted operational files are "likely" to contain the records. Unless the requester files a sworn statement disputing the CIA's claim, the CIA cannot be required to review the content of any exempted operational file in order to meet its burden. Unlike the CIA's statement, which does not have to be made on personal knowledge and need not attest to the existence of any fact, only a speculative "liklihood," the requester's affidavit must be "based on personal knowledge or otherwise admissible evidence. If the requester is unable to submit such a statement, the court is forbidden to order the CIA to review the content of "any exempted operational file or files." These provisions negate any meaningful de novo review on this issue, too.

Although the chance of actual de novo review in these two circumstances is exceedingly slim, it was apparently too dicey for for the authors and supporters of H.R. 5164. So the bill removes the last vestige of hope for the requester, already bound hand and foot, by gagging him as well. It contains a unique feature abro-

gating all discovery provided by the Federal Rules of Civil Procedure other than requests for admissions, the least effective form of discovery. No meaningful opportunity to challenge the accuracy or veracity of the CIA's representations is to be allowed.

H.R. 5164 provides that at least once every ten years the Director of the CIA is to review the status of exempted operational files to determine whether the exemptions "may be removed from any category of exempted operational files or any portion thereof." It also directs that this review "shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein."

It is unclear whether this provision obligates the CIA to review the status of <u>all</u> its operational files once every ten years, or if it only has to review those exempted operational files which contain records that have been the subject of Freedom of Information Act requests. If the former is required, this bill might not reduce the CIA's Freedom of Information Act burden much, at least to the extent that the review is in any sense meaningful. But it is clear that in conducting its review, the CIA is not required to examine the records contained in the exempted operational files; all it has to do is "review the exemptions in force" and consider the "historical or other public interest in the subject matter" of the files. Nor is the CIA obliged to remove a single file or portion thereof from its exempt category as a result of its ten-year review. All

the CIA bureacrat making the decision has to do is examine a list of exempted operational files, contemplate his naval and muse for a few moments on the historical value and public interest in the subject matter of the files. Judicial review of this provision is limited to determining (1) whether the CIA has conducted the reveiw within the specified ten-year period, and (2) whether the CIA in fact considered the historical value and public interest in the subject matter of the files.

In essence, any public benefit to be gained from this provision depends on a profound change in the CIA's own attitudes and practices. Nothing in the bill can compel this change, and past experience suggests that only an inveterate delusionist could believe that such a change is even remotely likely.

The CIA's intransigent attitude toward disclosure is well-known. In 1965 the White House, reacting to citizen protest against keeping Warren Commission records secret, solicited the views of several federal agencies on what records could be released to the public. Only the CIA was adamant against all disclosure. It proposed that all its records pertaining to the Warren Commission investigation be kept secret for 75 years. After passage of 75 years, it would then conduct a review to see whether another period of secrecy was required. The White House rejected this suggestion, and the Department of Justice promulgated guidelines requiring review of withheld Warren Commission materials every five years. Still, the CIA continued to withhold extremely important documents on spurious grounds. These documents, ultimately obtained only as a result of Freedom of Information Act litigation, played an important role in creating

the climate of opinion which led to the creation of the House Select Committee on Assassinations, which ultimately concluded that there probably was a conspiracy to assassinate President Kennedy, and that the CIA had withheld significant information from the Warren Commission. Had the CIA not resisted disclosure of records pertaining to the assassination of President Kennedy, the Congressional investigation might have occurred at an earlier date, under far more advantageous circumstances, when the facts and circumstances of the crime had not grown so cold.

In assessing the possibility that H.R. 5164's ten-year review will liberate any substantial amount of information, an examination of the CIA's performance under Executive Order 12065 is particularly germane. Promulgated by President Carter, E.O. 12065 established criteria for determining what information should be withheld in the interest of national security. A key provision asserted that the need to protect classified information may sometimes be outweighed by the public interest in the disclosure of the information, and it directed that in such cases the information should be declassified. This balancing provision was skillfully ignored by the CIA. First it promulgated guidelines which delineated the extremely narrow circumstances in which it would apply the balancing test. Even after these guidelines were found to be inadequate by ISOO, it refused to apply the balancing test to even the most obvious and compelling cases of public interest. Its litany recited that it did not conduct any balancing of the public interest in disclosure

against the needs of national security because circumstances had not arisen which required it to do so. Although it lost some battles in the lower courts, it successfully tied requesters up in litigation on this issue until the Reagan administration came to power, rescinded E.O. 12065 and issued a new Executive order on classification which eliminated the balancing provision.

Recent events do not suggest that the CIA is worthy of the trust H.R. 5164 exudes. Just this year relations between the Senate Intelligence Committee and the CIA were inflamed because the CIA, despite a legal obligation to do so, failed to adequately inform the committee of its clandestine activities in Central America. If the CIA will not in secret inform a customarily deferential Congressional oversight committee of matters that it is required by law to report, then why should anyone expect the CIA to conform in good faith to a measure which meekly states that it should "consider" the historical and public interest in determining whether to disclose sensitive records on controversial subjects to persons it generally expects to be highly critical of, or outright hostile to, its endeavors?

H.R. 5164 rests on highly questionable assumptions. The CIA and the ACLU, the major participants in its genesis and evolution, assert that it will clear up the CIA's backlog, thus resulting in faster processing of nonoperational files. They also promise that this will be done without any meaningful information being withheld that is currently obtainable under the Freedom of Informa-

tion Act.

The CIA claims its current backlog is two to two and a half years. But requesters have been known to wait far longer without action by the CIA. In one case the CIA assured the requester on no less than 11 occasions over a six year period that it was processing his request, that he should wait another two or three weeks, another two or three months, etc. When he filed suit after six years, he found that all the CIA had done was to number the couple of hundred documents involved, many of which were simply newspaper clippings or records that previously had been released. These examples suggest that the CIA's backlog may be self-created. Credence was lent to this suspicion by a statement submitted to the House Subcommittee on Government Information, Justice and Agriculture by former CIA officer Ralph McGehee. McGehee bluntly charged that "[t]he CIA has one of the worst records in responding to FOIA requests not due to the difficulty of the task but because of its deliberate delays." If this is the case, even an exemption for operational files is unlikely to clear up its backlog.

A second assumption is that the CIA has not in the past released any meaningful information from "operational files" that would not also be released if H.R. 5164 becomes law. Some researchers flatly dispute this claim, notwithstanding the ACLU's acceptance of it. Two points should be stressed in this regard. First, the Freedom of Information Act only really became effective nine years ago, when Congress first amended it. Because of the

CIA's bitter-end litigation tactics, fundamental issues regarding the exemption claims it primarily relies upon have yet to be definitively resolved. For example, the Sims case, now pending before the United States Supreme Court, involves the definition and scope of the term "intelligence source" in 50 U.S.C. § 403(d)(3), the CIA's Exemption 3 statute. Much of the information withheld by the CIA, if not most, is withheld under the claim that its disclosure would reveal the identity of an itelligence source. During the course of the Sims litigation it emerged that the CIA's definition of "intelligence source" is so broad that it includes publications such as Pravda and The New York Times.

In another case, Fitzgibbon v. CIA, a district judge recently issued a lenghthy opinion based on an exhaustive in camera review of documents pertaining to the disappearance and presumed death in 1956 of Basque exile Jesus de Galindez, a public critic of Rafael Trujillo, then dictator of the Domincan Republic. Chastizing the CIA for in camera affidavits he called "practically worthless, Judge Harold Greene ruled in Fitzgibbon's favor on a number of important points. He rejected the CIA's claim that it could justifiably withhold the names of sources it described as "potential or unwitting" sources, as well as the CIA's "general assumption" that disclsoure of the name of any individual with whom it spoke concerning the Galindez affair, no matter how long ago, would be likely to cause identifiable damage to the national defense or foreign policy of the United States. He also found that in deleting "intel-

ligence methods," "the CIA has withheld information so basic and innocent that its release could not harm the national security or betray a CIA method." In some instances, he said, "a weak claim is asserted with respect to particularly noteworthy information--such as the suggestion that Galindez may not have perished at all but may have fled to another country . . . and it may be that the CIA is acting more out of a desire to prevent a politically unpalatable reaction than out of a legitimate judgment that secrecy is required."

These and other holdings in the Fitzgibbon case are sure to result in appeals which may take years to finally resolve. Because their final outcome could have a very considerable impact on the amount of material which the CIA may withhold from "operational files," it is at best premature to claim that the proposed legislation, H.R. 5164, will not result in any greater withholding of significant information that presently occurs under the Freedom of Information Act. What a litigant is entitled to under FOIA has not yet been resolved.

The second point to be kept in mind here is that a thorough and careful analysis of what may be withheld under H.R. 5164 that is not withholdable under the Freedom of Information Act has not yet been made. The ACLU, it is true, has made an analysis of some materials and concluded that the CIA's claim is valid. But surely a bill with consequences as important as those which attend this measure requires that a wide range of materials released by the CIA in the past be carefully scrutinized, and not only by the ACLU, before the assumptions on which it is based are accepted as true.

A CIA list of pending Freedom of Information Act cases which may contain information in exempted operational files and thus be affected by this legislation contains only 16 cases. Of those 16, 10 concern the efforts of researchers to learn more about the assassination of President John F. Kennedy. It is troubling that the subject area apparently most directly affected by the proposed legislation would be the assassination of President Kennedy. It is more troubling that the Congressional committees which considered this legislation have made no attempt to learn why this is so or consider whether it is wise to shut off further exploration into this subject.

Also troubling is the failure of H.R. 5164 to contain certain safeguards protecting the right of the public to know, at least at some point in history, what the CIA has done in our name. Last year the ACLU was reported to be taking the position that without a time limit on how long operational files are exempt from search and review, the proposed legislation would be unacceptible. Access Reports, June 22, 1982, p. 2. H.R. 5164 contains no such provision. Nor does it contain any provision forbidding the CIA from destroying the operational files it exempts from search and review.

The attempt to ram this legislation through Congress is ill-advised. Its effects have been inadequately discussed and analyzed. In its present form it is unacceptible and every effort should be made to defeat it.